S E R V E D
December 14, 2011
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 10-08

BIMSHA INTERNATIONAL

v.

CHIEF CARGO SERVICES, INC. AND KAISER APPAREL, INC.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE CLAY G. GUTHRIDGE[1]

BACKGROUND

I. OVERVIEW AND SUMMARY OF DECISION.

On July 28, 2010, the Commission received a Complaint filed by Bimsha International (Bimsha) alleging that respondents Chief Cargo Services, Inc. (Chief Cargo) and Kaiser Apparel, Inc. (Kaiser) violated section 10(d)(1) of the Shipping Act of 1984 (Shipping Act or Act), 46 U.S.C. § 41102(c).[2] Section 10(d)(1) provides: "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable

---

[1] The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

[2] On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to "reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law." H.R. Rep. 109-170, at 2 (2005). Section 10(d)(1) is now codified at 46 U.S.C. § 41102(c). The Commission often refers to provisions of the Act by their section numbers in the Act's original enactment, references that are well-known in the industry. *See, e.g., Worldwide Logistics Co., Ltd. – Possible Violations of Sections 10(a)(1) and 10(b)(2) of the Shipping Act of 1984*, FMC No. 11-04 (Mar. 30, 2011) (Order of Investigation and Hearing). I follow that practice in this Initial Decision.

regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).[3]

Bimsha, a manufacturer of garments in Pakistan, retained Chief Cargo, a non-vessel-operating common carrier (NVOCC) licensed by the Commission, to transport cargo by water from Pakistan to the United States. There is no dispute as to what happened to the shipments at issue. On three separate shipments, Chief Cargo released the container to the purchaser of the goods without requiring presentation of an original bill of lading. Bimsha alleges that it has only received partial payment for the goods in the first container released and has not been paid anything for the goods in the second and third containers. Bimsha contends that release of a shipment without requiring presentation of an original bill of lading violates section 10(d)(1) of the Shipping Act.

Chief Cargo contends that the Commission does not have jurisdiction over Bimsha's Complaint, arguing that Bimsha's claim is no more than a simple contract breach claim, not a violation of the Shipping Act.

This proceeding raises the issue of whether an NVOCC that releases cargo to a "notify party" without requiring presentation of an original bill of lading has "fail[ed] to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property" in violation of section 10(d)(1). I conclude that an NVOCC does violate section 10(d)(1) in this circumstance.

The Act provides: "If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a). Bimsha seeks a reparation award "in the sum of $207,809.74 with interest costs and legal expenses incurred of $79,331.00 as of June 28, 2011 amounting to the sum of $287,140.74." (Bimsha Supp. Brief at 9.) Bimsha does not meet its burden of establishing an actual injury. Therefore, Bimsha is not entitled to a reparation award or an award of attorney's fees. Bimsha is not entitled to an award of costs. I enter an order requiring Chief Cargo to cease and desist releasing cargo without requiring presentation of an original bill of lading.

Bimsha and Chief Cargo are represented by counsel. Kaiser has not filed an answer or participated in this proceeding. Bimsha seeks entry of default judgment against Kaiser. Bimsha has

---

[3] The Complaint also alleges that Respondents violated "U.S. Code Title 46 Sec 1(a), Sec 30701(4), 30701(6), 30701(7), 30701(8), Sec 41102(b) . . . (Shipping Act Sec 10(a)(1) . . .), 41301 (sec 11(a) of the Shipping Act), 41302, 41203, 41304, 41305, 41309, 305 U.S. Code 49 Sec 80101, 80102, 80103, 80104, 80110, 80111, 80116, 80106." (Complaint ¶ III.) Some of these sections cannot be found as cited. The Commission only has jurisdiction over allegations of violations of the Shipping Act. 46 U.S.C. §§ 40101-41309. Sections 41301-41309 of the Act set forth procedures for enforcement, not substantive requirements on NVOCCs. The Complaint alleges violation of section 10(a)(1), but Bimsha does not address this in its briefs. Therefore, I consider it abandoned.

not established that Kaiser operated as a common carrier, marine terminal operator, or ocean transportation intermediary on the shipments; therefore, the Complaint against Kaiser is dismissed.

II. PROCEDURAL BACKGROUND.

Chief Cargo responded to Bimsha's Complaint by filing a motion to dismiss for failure to state a claim. Relying on *Cargo One Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000) (*Cargo One*), Chief Cargo argued that Bimsha could not rebut the presumption against it that Bimsha's "claim is no more than a simple contract breach claim." After the motion to dismiss was denied, *Bimsha Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-08 (ALJ Oct. 22, 2010) (Memorandum and Order on Motion to Dismiss in Lieu of Answer), Bimsha and Chief Cargo engaged in discovery.

On June 29, 2011, Bimsha filed its proposed findings of fact, appendix with exhibits, and opening brief on the merits. Chief Cargo filed its responses on July 29, 2011, and Bimsha its reply on August 17, 2011. I ordered the parties to appear by telephone on September 28, 2011, for oral argument on the briefs. *Bimsha Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-08 (ALJ Sept. 27, 2011) (Order to Appear by Telephone for Oral Argument on the Parties' Briefs). The parties appeared on September 28, 2011. The argument was recorded and transcribed. *See* September 28, 2011, Transcript.

I determined that "there are significant gaps in the parties' legal arguments and evidentiary support and that as currently constituted, the Commission does not have an adequate record on which to base a decision. Therefore, the parties must file supplemental proposed findings of fact, appendices, and briefs." *Bimsha Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-08 (ALJ Oct. 3, 2011) (Order for Parties to File Supplemental Proposed Findings of Fact, Appendices, and Briefs). On October 14, 2011, Bimsha filed its opening supplemental brief, proposed findings of fact, and appendix. Chief Cargo filed its responses on October 28, 2011, and Bimsha its reply on November 7, 2011. The proceeding is ripe for decision.

DISCUSSION

I. JURISDICTION.

The Shipping Act provides: "A person may file with the . . . Commission a sworn complaint alleging a violation of this part. . . ." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 999 (FMC 2006). *See also Cargo One*, 28 S.R.R. at 1645 (allegations of violations of section 10(d)(1) involving just and reasonable regulations and practices "are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission"). The complaint must allege "a violation" of the Act; therefore, a complaint alleging one violation of section 10(d)(1) would state a claim. Bimsha's Complaint alleges that on three separate shipments, Chief Cargo and

Kaiser violated section 10(d)(1) by releasing the cargo without requiring the presentation of an original bill of lading. Therefore, Bimsha's Complaint states a claim under the Act.

Chief Cargo argues that the Commission does not have subject matter jurisdiction over Bimsha's Complaint.

> The claim alleged by Bimsha . . . is not properly before the . . . Commission, and therefore, the Complaint should be dismissed for lack of subject matter jurisdiction. In the . . . Complaint, Bimsha . . . contends that Respondent released the goods without obtaining the endorsed bills of lading. The relationship between Bimsha . . . and Chief Cargo . . . is governed by the applicable bills of lading, not a services [*sic*] contract, and the claim made herein is contractual in that it stems from the obligations created by the bills of lading.
>
> Bills of lading for the carriage of goods by sea are maritime contracts, and jurisdiction over maritime contracts is granted to the judicial branch of the federal government by Article III, Section 2 of the United States Constitution . . . . The Constitution vests the federal courts with the power to adjudicate "all cases of admiralty and maritime jurisdiction," such as the controversy herein. The exercise of judicial power to redress a party for injuries suffered as a result of an alleged breach of a bill of lading, and not a services contract, is beyond the subject matter jurisdiction of the Federal Maritime Commission. *Cargo One Inc.*, 2000 WL 1648961, at *15.
>
> None of Bimsha International's allegations involve elements peculiar to the Shipping Act of 1984, and therefore, the . . . Commission should not adjudicate the action. *Cargo One Inc.*, 2000 WL 1648961, at *14. . . . It is not the purpose of the . . . Commission to hear breach of contract claims, even where, as is the case here, those claims are cloaked in unsubstantiated allegations of violations of the Shipping Act of 1984.
>
> [Bimsha's] claim is premised on the obligation of Chief Cargo . . . to meet certain contractual commitments created through the bills of lading. The claim is a "breach of contract action[] which section 8(c) [of the Shipping Act of 1984] renders not properly before the Commission in the absence of evidence offered by complainant (as the party bearing the burden of proof) that some extraordinary aspects of the allegation distinguish it substantially from a breach claim." *Cargo One Inc. v. COSCO Container Lines Co., Ltd.*, 2000 WL 1648961, at *14 (F.M.C., Docket No. 99-24, Oct. 31, 2000). Bimsha . . . fails to offer any evidence indicating that its claim is anything more than an action for breach of contract for money damages based on bills of lading. [Bimsha's] claim for damages ought to be brought in a court of competent jurisdiction. Its Complaint, herein, should be dismissed, as the . . . Commission lacks subject matter jurisdiction over the matter.

(Chief Cargo July 29, 2011, Reply Brief at 5-7.)

Section 8(c) of the Act on which Chief Cargo relies, now codified at 46 U.S.C. § 40502, provides: "An individual ocean common carrier or an agreement between or among ocean common carriers may enter into a service contract with one or more shippers subject to the requirements of this part." 46 C.F.R. § 40502(a). The section of the Act at issue in *Cargo One* on which Chief Cargo relies states:

> Unless the parties agree otherwise, the exclusive remedy for a *breach of a service contract* is an action in an appropriate court. The contract dispute resolution forum may not be controlled by or in any way affiliated with a controlled carrier or by the government that owns or controls the carrier.

46 C.F.R. § 40502(f) (emphasis added).

Bimsha's Complaint does not allege that Chief Cargo breached a service contract and, in fact, Bimsha did not have a service contract with Chief Cargo. (Chief Cargo July 29, 2011, Reply Brief at 5, quoted *supra*.) Therefore, section 8(c) does not deprive the Commission of jurisdiction over Bimsha's Complaint.

Even if Chief Cargo and Bimsha were parties to a service contract, a claim that Chief Cargo violated section 10(d)(1) could also "also involve elements peculiar to the Shipping Act." *Cargo One*, 28 S.R.R. at 1645. "[W]e find that the alleged violation[] of section[] . . . 10(d)(1), involving . . . just and reasonable regulations and practices, [is] inherently related to Shipping Act prohibitions and [is] therefore appropriately brought before the Commission." *Id.* "While section 8(c) provides that parties to a service contract may agree to arbitrate breach of contract issues, it was not Congress' intent that the Commission be barred from adjudicating whether the parties' conduct violates the Shipping Act and Commission regulations." *Anchor Shipping v. Aliança Navegação*, 30 S.R.R. at 999. Although the Constitution may grant jurisdiction to adjudicate maritime contracts to the judicial branch, the Shipping Act grants jurisdiction to adjudicate complaints that allege violations of the Act to the Commission. 46 U.S.C. § 41301(a).

Chief Cargo also contends that the Commission's jurisdiction does not extend to claims or causes of action encompassed by other federal legislation.

> Bimsha, has asserted, in essence, that Respondent, Chief Cargo, delivered its goods to the correct Consignee, Rich Kids Jeans Corp., but did so without first obtaining surrender of the original bills of lading. That conduct is specifically controlled by the Webb-Pomerene Act of 1918 (46 U.S.C.A. §§ 80101-80116). Specifically, Petitioner's assertion is that Chief Cargo is liable under 49 U.S.C.A. § 80111 (a)(1) which provides: "a common carrier is liable for damages to the person having title to, or right to possession of, goods when – (1) the carrier delivers the goods to a person not entitled to their possession unless delivery is authorized under § 80110 (b)(2) or (3) of this title.["] In our case, Petitioner's assertion is that Chief Cargo

failed to comply with 49 U.S.C.A. § 80110 (b)(3) which states: "(b) person to whom goods may be delivered – Subject to Section 80111 of this title, a common carrier may deliver the goods covered by a bill of lading to – (3) the person in possession of a negotiable bill if (A) the goods are deliverable to the order of that person; or (B) the bill has been endorsed to that person or in blank by the consignee or another endorsee." 49 U.S.C.A. § 80111(b)(3).

Because the Webb-Pomerene Act of 1918 has specific requirements and procedures for determining the liability of a common carrier (which there is no dispute Chief Cargo is), the only proper forum for deciding a claim under the Webb-Pomerene Act of 1918 is in the appropriate United States District Court which possess both federal question and admiralty jurisdiction to hear such a dispute.

It is respectfully submitted, that for the Federal Maritime Commission to exert jurisdiction over a petition where the sole assertion before the Commission is the claim by Petitioner that it delivered cargo to the common carrier, and that common carrier delivered the cargo to the correct consignee, but without the surrender of the original bill of lading, can somehow be a violation of the Shipping Act of 1984, but not in violation of the Webb-Pomerene Act 1918 is beyond the realm of possibility. Therefore, the Petition of Bimsha must be dismissed.

(Chief Cargo Supp. Reply Brief at 3-4.)

I recognize that the Commission does not enforce the Webb-Pomerene Act. *See Bimsha Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-08 (ALJ Oct. 22, 2010) (Memorandum and Order on Motion to Dismiss in Lieu of Answer) ("I note that the Commission does not have jurisdiction to enforce 49 U.S.C. § 80111."). Chief Cargo does not cite any authority supporting its contention that an act by a common carrier that may have violated the Webb-Pomerene Act cannot also violate section 10(d)(1) of the Shipping Act and be sanctioned by the Commission. The initial decision in this case is based on Chief Cargo's violation of section 10(b)(1) of the Shipping Act, not the Webb-Pomerene Act.

I conclude that the Commission has jurisdiction over Bimsha's Complaint.

II. CONTROLLING LAW AND BURDEN OF PERSUASION.

Bimsha alleges that Respondents violated section 10(d)(1) of the Shipping Act while carrying Bimsha's shipments.

Section 10(d)(1) provides: "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). Since section 10(d)(1) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries, to violate section 10(d)(1), an

entity must be a common carrier, marine terminal operator, or an ocean transportation intermediary within the meaning of the Act. *See Houben v. World Moving Services, Inc.*, 31 S.R.R. 1400, 1404 n.8 (FMC 2010) (*Houben*) ("by definition, only a common carrier, ocean transportation intermediary or marine terminal operator may violate section 10(d)(1)"). Bimsha does not contend that either Chief Cargo or Kaiser operated as a marine terminal operator, 46 U.S.C. § 40102(14), or as a vessel-operating common carrier. 46 U.S.C. § 40102(17). Therefore, I need only determine whether either Chief Cargo or Kaiser operated as an ocean transportation intermediary within the meaning of the Act.

The Act defines two types of ocean transportation intermediaries: "Ocean freight forwarders" and "non-vessel-operating common carriers." 46 U.S.C. § 40102(19). "The term 'ocean freight forwarder' means a person that – (A) in the United States, *dispatches shipments from the United States* via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(18) (emphasis added). The three shipments at issue were dispatched *from* a foreign country *to* the United States. Therefore, even if it were proven that Chief Cargo and Kaiser are licensed by the Commission or operated as unlicensed ocean freight forwarders, neither Chief Cargo nor Kaiser could have operated as an ocean freight forwarder within the meaning of the Act on the shipments at issue.

There is no claim that either respondent acted as a marine terminal operator or a vessel-operating common carrier and an ocean freight forwarder as defined by the Act dispatches shipments *from* the United States while the shipments at issue came *into* the United States. Therefore, as part of proving that Respondents violated section 10(d)(1), Bimsha must prove that Respondents operated as NVOCCs on the shipments.

"The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(16). To be an NVOCC on a particular shipment, an entity must meet the Act's definition of "common carrier" on the shipment.

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6).

A complainant alleging that a respondent violated section 10(d)(1) of the Act "has the initial burden of proof to establish the[] violation[]. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary

premise is more likely to be true than to be not true." *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at *3 (ALJ June 13, 2005). *See* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R. § 502.155. "[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] was burden of persuasion, and we understand the APA's unadorned reference to 'burden of proof' to refer to the burden of persuasion." *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994).

The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). "[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose." *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (1994).

III. EXHIBITS.

The Administrative Procedure Act (APA) provides:

> Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556(d). Commission Rule 156 provides:

> In any proceeding under the rules in this part, all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible. All other evidence shall be excluded. Unless inconsistent with the requirements of the Administrative Procedure Act and these Rules, the Federal Rules of Evidence, Public Law 93-595, effective July 1, 1975, will also be applicable.

46 C.F.R. § 502.156.

Relying on these provision, the Commission has stated.

> Consistent with guidelines set out in the APA and Commission rules governing the admission of evidence, "[i]n comparison with court trials, administrative adjudications generally are governed by liberal evidentiary rules that create a strong presumption in favor of admitting questionable or challenged evidence." Ernest Gellhorn & Ronald M. Levin, *Administrative Law and Process* 255 (4th ed. 1997). In administrative proceedings, "[a]n agency Administrative Law Judge (ALJ) should

> admit all relevant and arguably reliable evidence and then should determine the relative probative value of the admitted evidence when . . . [he] writes . . . [his] findings of fact." Kenneth Culp Davis & Richard J. Pierce, Jr., 2 *Administrative Law Treatise* § 10.1, p.117 (3d ed. 1994).

EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27, 31 S.R.R. 540, 547 (FMC 2008).

When it filed its opening brief dated June 28, 2011, Bimsha submitted an appendix containing Exhibits A through F.1, F.2, and F.3.[4] Exhibit A contains documents purportedly related to the May 2009 shipment, Exhibit B contains documents purportedly related to the June 2009 shipment, and Exhibit C contains documents purportedly related to the August 2009 shipment. Exhibit D contains three documents entitled "Commercial Invoice." Exhibit E is a letter dated 23 September 2008 on Chief Cargo stationery to M.R. Group, Attn Athar Baig, Re Kaiser Apparel, and signed by Edmond Yau, President. Exhibit F.1 is a letter dated June 7, 2011, on Soneri Bank stationery "To whom it may concern." Exhibit F.2 is an invoice in the amount of US$ 3650.00 issued 16/05/2011 (May 16, 2011) by Smart Holidays (Pvt.) Ltd. to Bimsha and a second invoice in the amount of US$ 4500.00 issued 08/11/2009 (November 8, 2009) by Smart Holidays (Pvt.) Ltd. to Bimsha. Exhibit F.3 is a bill from Bimsha's counsel for legal services rendered.

In its response to Bimsha's opening brief, Chief Cargo contended: "Complainant's Appendix consists of unauthenticated documents and contains no testimonial evidence either laying a foundation for the admission of such documents or independently substantiating the alleged violations by Respondent." (Chief Cargo July 29, 2011, Reply Brief at 1.)

On August 15, 2011, Bimsha submitted Exhibits 1 through 4 with its reply to Chief Cargo's brief. Reply Exhibit 1 is a copy of Chief Cargo's brief in reply to Bimsha's original brief. Reply Exhibit 2 is a copy of *Bimsha Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-08 (ALJ Oct. 22, 2010) (Memorandum and Order on Motion to Dismiss in Lieu of Answer). Reply Exhibit 3 (identified as Exhibit 4 in Bimsha's Reply Brief at 6) consists of pages 15 and 16 of the deposition of "Claimant's witness, Mr. Adeeb." (Bimsha Reply Brief at 7.) Reply Exhibit 4 (identified as Exhibit 3 in Bimsha's Reply Brief at 6) is a second copy of Bimsha Exhibit E. Bimsha did not reply to the contention Chief Cargo stated in its brief that Bimsha had not established a foundation for the admission of Bimsha's exhibits.

During the September 28, 2011, argument, Chief Cargo reiterated its objection to the admission of the exhibits submitted by Bimsha with the exception of the three bills of lading.

---

[4] The Order to submit an appendix with the brief states: "The pages of the appendix shall be numbered sequentially and secured in a three-ring binder." *Bimsha Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-08, Order at 3 (ALJ Dec. 3, 2010) (December 3, 2010 Procedural Order). Neither party complied with this requirement.

JUDGE GUTHRIDGE: Okay. Mr, Mr. Perrone [counsel for Chief Cargo], do you have any objection to admission of any of these documents as –

[Chief Cargo Counsel]: I do, Your Honor. None of them have a foundation. With the exceptions of the bills of lading, which we've already admitted to, which don't have any amounts on them, none of the documents have a foundation that Mr. Schwartz [counsel for Bimsha] has referred to.

Sept. 28, 2011, Transcript at 42-43. The need for a foundation for admission of the documents was discussed at length in the argument.

JUDGE GUTHRIDGE: I'm looking, I'm looking at Exhibit A attached to your July 1 submission. The first page is a Soneri Bank document of some sort that has no foundation. The second page –

[Bimsha Counsel]: Those are banking, those are banking receipts.

JUDGE GUTHRIDGE: But there's no foundation for it. They're hearsay, aren't they?

[Bimsha Counsel]: I don't know that they are hearsay because they refer to the goods.

JUDGE GUTHRIDGE: They're documents. They're out of court declarations that you're offering to prove the truth of something. They're hearsay. Now, they might made – they might be business records and might be admissible under the business, under 8036.[5]

[Bimsha Counsel]: Well, that's what there are.

JUDGE GUTHRIDGE: Where's your foundation? Where's your foundation for those, for admission of that?

[Bimsha Counsel]: My client obtained those records from the bank. Those are the bank receipts.

JUDGE GUTHRIDGE: Where in your submission does it tell me that?

[Bimsha Counsel]: I'm not –

---

[5] This is a reference to Federal Rule of Evidence 803(6) governing admissibility of records of regularly conducted activity as an exception to the hearsay rule.

JUDGE GUTHRIDGE: Where's the evidence establishing that those documents are business records?

[Bimsha Counsel]: I think those documents were issued by the bank referring to different shipments involved in the claim, and we attached them to show the court that the bank was waiting to get payment.

JUDGE GUTHRIDGE: But, have you, have you established a foundation for their admissibility?

[Bimsha Counsel]: No, other than obtaining the documents from the bank that we attached, I don't know how or what foundation was made to establish that, but –

JUDGE GUTHRIDGE: Okay.

[Bimsha Counsel]: – that really is underlying the claim and who's supposed to get the payment.

JUDGE GUTHRIDGE: Right, I understand. That's why you're offering them – you're offering them to prove a part of your case.

[Bimsha Counsel]: That's right.

JUDGE GUTHRIDGE: And, I'm – and I'm asking what establishes the foundation for their admissibility?

[Bimsha Counsel]: My client offered that as documents he received or they received from the bank attaching it to the, the claimant's documents establishing the claim.

JUDGE GUTHRIDGE: Where does it say that in this record?

[Bimsha Counsel]: I think he made that claim as part of the exhibits attached in the claim document that was originally filed in June of 2010.

JUDGE GUTHRIDGE: Okay. In your proposed findings of fact, do you designate a place in the record where I can find that?

[Bimsha Counsel]: I don't think it was in the claim, but I can check. I can look, I can look to give you that answer.

Sept. 28, 2011, Transcript at 30-33. *See also* Sept. 28, 2011, Transcript at 29-37; 38-44; 54; 77 ("But, there are some evidentiary problems that you have, Mr. Schwartz, that certainly aren't, aren't met by what you submitted"). At the conclusion of the hearing, the following colloquy occurred:

JUDGE GUTHRIDGE: Okay. Mr. Schwartz.

[Bimsha Counsel]: Yes.

JUDGE GUTHRIDGE: I hope you've paid attention to what I've talked about about foundation and –

[Bimsha Counsel]: Yes.

JUDGE GUTHRIDGE: – what the December 3 order contemplates that you'd be filing on this

[Bimsha Counsel]: Yes. Yes. I shall, I shall obey.

Sept. 28, 2011, Transcript at 83.

On October 3, 2011, I issued an order requiring the parties to file supplemental proposed findings of fact, appendices, and brief. *Bimsha Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-08 (ALJ Oct. 3, 2011) (Order for Parties to File Supplemental Proposed Findings of Fact, Appendices, and Briefs). Bimsha included most of the documents submitted with its original Appendix and its Reply Appendix as exhibits with its Supplemental Brief dated October 14, 2011, this time identifying the exhibits submitted by number instead of letter. Original Appendix Exhibit A is Supplemental Appendix Exhibit 3; Original Appendix Exhibit B is Supplemental Appendix Exhibit 4; Original Appendix Exhibit C is Supplemental Appendix Exhibit 5; the three pages in Original Appendix Exhibit D are included in Supplemental Appendix Exhibits 3, 4, and 5; Original Appendix Exhibit E and Reply Exhibit 4 are Supplemental Appendix Exhibit 2; Original Appendix Exhibits F.1, F.2, and F.3 are Supplemental Appendix Exhibit 6; Reply Exhibit 2 is Supplemental Appendix Exhibit 1. Supplemental Appendix Exhibit 7, not submitted as an exhibit with the original appendix, is a document entitled MOU – Payment Commitment For Bimsha dated November 13, 2009. Supplemental Appendix Exhibit 8, not submitted as an exhibit with the original appendix, is the transcript of the June 3, 2011, deposition of John Lam testifying for Chief Cargo.

Bimsha submitted two more exhibits with its Supplemental Reply Brief. Supplemental Reply Exhibit 9 is a copy of the Order requiring the parties to file supplemental papers. *Bimsha Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-08 (ALJ Oct. 3, 2011) (Order for Parties to File Supplemental Proposed Findings of Fact, Appendices, and Briefs). Supplemental Reply Exhibit 10 is General Accounting Office Report No. 74-178, *Clarifying Webb-Pomerene Act Needed to Help Increase U.S. Exports* (Aug. 22, 1973).

Bimsha submitted at least two copies of most of the documents that it relies on as exhibits. To reduce confusion that could be generated by admission of two copies of the same exhibits, and because Bimsha's second set of exhibits includes additional exhibits, I **DO NOT ADMIT** as evidence in this proceeding Bimsha's Exhibits A through F.3 submitted with Bimsha's original brief,

all of which were also submitted with Bimsha's supplemental brief, as they are unduly repetitious or cumulative.

With regard to the exhibits submitted by Bimsha on August 15, 2011, Reply Exhibit 1 is a copy of Chief Cargo's brief in reply to Bimsha's original brief. I do not admit Reply Exhibit 1 as it is unduly repetitious or cumulative. Furthermore, the argument of Chief Cargo's counsel is not evidence. Reply Exhibit 2 is a copy of *Bimsha Int'l v. Chief Cargo Services*, FMC No. 10-08 (ALJ Oct. 22, 2010) (Memorandum and Order on Motion to Dismiss in Lieu of Answer) and is identical to Exhibit 2 in the Supplemental Appendix. I do not admit Reply Exhibit 2 as it is unduly repetitious or cumulative. Bimsha Reply Exhibit 3 (identified as Exhibit 4 in Bimsha's Reply Brief at 6) consists of pages 15 and 16 of the deposition of "Claimant's witness, Mr. Adeeb." (Bimsha Reply Brief at 6.) Reply Exhibit 3 is admitted into evidence. Bimsha Reply Exhibit 4 (identified as Exhibit 3 in Bimsha's Reply Brief at 6) is identical to Supplemental Exhibit 2. I do not admit Reply Exhibit 4 as it is unduly repetitious or cumulative.

Despite the discussion in the September 28, 2011, argument about the need for a foundation for the exhibits and the statement of Bimsha's counsel that "I shall obey," Bimsha did not even attempt to establish a foundation for most of its exhibits. Chief Cargo reiterated its objection in its Supplemental Brief: "Complainant's Supplemental Appendix, like its original submission, consists of nothing more than unauthenticated documents and contains no testimonial evidence either laying a foundation for the admission of such documents or independently substantiating the alleged violations by Respondent." (Chief Cargo Supp. Brief at 2.) Bimsha did not address Chief Cargo's contention or attempt to establish a foundation in its supplemental reply brief.

Upon consideration of the foregoing, I make the following rulings on Bimsha Supp. Exhibits 1 through 10 submitted with Bimsha's supplemental brief and supplemental reply brief:

Bimsha Supp. Exhibit 1 *Bimsha Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-08 (ALJ Oct. 22, 2010) (Memorandum and Order on Motion to Dismiss in Lieu of Answer).

RULING:

I take official notice of this Commission record. 46 C.F.R. § 502.226.

Bimsha Supp. Exhibit 2 Letter dated 23 September 2008 on Chief Cargo stationery to M.R. Group, Attn Athar Baig, Re Kaiser Apparel, and signed by Edmond Yau, President.

RULING:

Bimsha Supp. Exhibit 2 is admitted as an admission of Chief Cargo. Fed. R. Evid. 801(d)(2).

Bimsha Supp. Exhibit 3

A. Copy of Bill of Lading CC-586-003 NYK
B. Bill of Exchange for Shipment
C. Commercial Invoice for Shipment
D. Packing List for Shipment
E. Inspection Certificate for Shipment
F. Certificate of Origin for Shipment
G. Mixed Carton Details
H. Partial payment receipts from Soneri (Claimant's) Bank

RULING:

Bimsha Supp. Exhibit 3.A is the Chief Cargo bill of lading for the May 8, 2009, shipment. Chief Cargo concedes that it issued the bills of lading. Sept. 28, 2011, Transcript at 42-43. Bimsha Supp. Exhibit 3.A is admitted.

The admissibility of Bimsha Supp. Exhibits 3.B through 3.H was questioned by Chief Cargo in its reply to Bimsha's opening brief and in its reply to Bimsha's supplemental brief. The need to establish a foundation for Bimsha's exhibits (not all of which were created by either Bimsha or Chief Cargo) was discussed extensively in the argument on September 28, 2011. I conclude from Bimsha's failure to attempt to establish a foundation for Bimsha Supp. Exhibits 3.B through 3.H in its four opportunities to establish a foundation, three of which occurred after Bimsha was put on notice by Chief Cargo's brief that the admissibility of the documents was in question and two of which occurred after the September 28, 2011, discussion of the need for a foundation, that the documents are not reliable.[6] Therefore, Bimsha Supp. Exhibits 3.B through 3.H are excluded pursuant to the APA and Commission Rule 156. 5 U.S.C. § 556(d); 46 C.F.R. § 502.156.

Bimsha Supp. Exhibit 4

A. Copy of Bill of Lading CC-592-003 NYK
B. Bill of Exchange for Shipment
C. Commercial Invoice for Shipment
D. Packing List for Shipment
E. Inspection Certificate for Shipment
F. Certificate of Origin for Shipment
G. Mixed Carton Details

RULING:

Bimsha Supp. Exhibit 4.A is the Chief Cargo bill of lading for the June 17, 2009, shipment. Chief Cargo concedes that it issued the bills of lading. Sept. 28, 2011, Transcript at 42-43. Bimsha Supp. Exhibit 4.A is admitted.

---

[6] During the deposition of Chief Cargo's representative, he was asked a number of questions about what appears to be these documents. (Bimsha Supp. Exhibit 8 (Transcript of Chief Cargo deposition June 3, 2011, at 6-12; 17).) The witness had never seen them.

The admissibility of Bimsha Supp. Exhibits 4.B through 4.G was questioned by Chief Cargo in its reply to Bimsha's opening brief and in its reply to Bimsha's supplemental brief. The need to establish a foundation for Bimsha's exhibits (not all of which were created by either Bimsha or Chief Cargo) was discussed extensively in the argument on September 28, 2011. I conclude from Bimsha's failure to attempt to establish a foundation for Bimsha Supp. Exhibits 4.B through 4.H in its four opportunities to establish a foundation, three of which occurred after Bimsha was put on notice by Chief Cargo's brief that the admissibility of the documents was in question and two of which occurred after the September 28, 2011, discussion of the need for a foundation, that the documents are not reliable. Therefore, Bimsha Supp. Exhibits 4.B through 4.G are excluded pursuant to the APA and Commission Rule 156. 5 U.S.C. § 556(d); 46 C.F.R. § 502.156.

Bimsha Supp. Exhibit 5

A. Copy of Bill of Lading CC-598-001 NYK
B. Commercial Invoice for Shipment
C. Packing List for Shipment
D. Inspection Certificate for Shipment
E. Certificate of Origin for Shipment
F. Mixed Carton Details

RULING:

Bimsha Supp. Exhibit 5.A is the Chief Cargo bill of lading for the June 17, 2009, shipment. Chief Cargo concedes that it issued the bills of lading. Sept. 28, 2011, Transcript at 42-43. Bimsha Supp. Exhibit 5.A is admitted.

The admissibility of Bimsha Supp. Exhibits 5.B through 5.F was questioned by Chief Cargo in its reply to Bimsha's opening brief and in its reply to Bimsha's supplemental brief. The need to establish a foundation for Bimsha's exhibits (not all of which were created by either Bimsha or Chief Cargo) was discussed extensively in the argument on September 28, 2011. I conclude from Bimsha's failure to attempt to establish a foundation for Bimsha Supp. Exhibits 5.B through 5.H in its four opportunities to establish a foundation, three of which occurred after Bimsha was put on notice by Chief Cargo's brief that the admissibility of the documents was in question and two of which occurred after the September 28, 2011, discussion of the need for a foundation, that the documents are not reliable. Therefore, Bimsha Supp. Exhibits 5.B through 5.F are excluded pursuant to the APA and Commission Rule 156. 5 U.S.C. § 556(d); 46 C.F.R. § 502.156.

Bimsha Supp. Exhibit 6

A. Soneri Bank Charges
B. Claimant's Travel Expenses to obtain collection
C. Claimant's Legal Expenses

RULING:

The admissibility of Bimsha Supp. Exhibit 6.A through 6.C was questioned by Chief Cargo in its reply to Bimsha's opening brief and in its reply to Bimsha's supplemental brief. The need to establish a foundation for Bimsha's exhibits was discussed extensively in the argument on

September 28, 2011. I conclude from Bimsha's failure to attempt to establish a foundation for Bimsha Supp. Exhibits 6.A and 6.B in its four opportunities to establish a foundation, three of which occurred after Bimsha was put on notice by Chief Cargo's brief that the admissibility of the documents was in question and two of which occurred after the September 28, 2011, discussion of the need for a foundation, that the documents are not reliable. Therefore, Bimsha Supp. Exhibits 6.A and 6.B are excluded pursuant to the APA and Commission Rule 156. 5 U.S.C. § 556(d); 46 C.F.R. § 502.156.

Bimsha Supp. Exhibit 6.C is a statement of Bimsha's attorney's fees and costs dated June 28, 2011. Commission Rule 254 provides that petitions for attorney's fees are normally filed after a reparation award becomes final. *See Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, 31 S.R.R. 1831, 1847 (ALJ 2011), notice not to review (FMC Apr. 12, 2011). Bimsha Supp. Exhibit 6.C is not relevant at this point in the proceeding. Therefore, Bimsha Supp. Exhibit 6.C is excluded pursuant to the APA and Commission Rule 156. 5 U.S.C. § 556(d); 46 C.F.R. § 502.156.

Bimsha Supp. Exhibit 7 MOU – Payment Commitment For Bimsha dated November 13, 2009.

RULING:

Bimsha Supp. Exhibit 7 is identical to Chief Cargo Exhibit 2 submitted with its reply to Bimsha's original brief. As both parties seek admission of the exhibit, Bimsha Supp. Exhibit 7 is admitted.

Bimsha Supp. Exhibit 8 Transcript of Chief Cargo deposition taken June 3, 2011.

RULING:

Bimsha Supp. Exhibit 8 is admitted.

Bimsha Supp. Reply Exhibit 9 *Bimsha Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-08 (ALJ Oct. 3, 2011) (Order for Parties to File Supplemental Proposed Findings of Fact, Appendices, and Briefs).

RULING:

I take official notice of this Commission record. 46 C.F.R. § 502.226.

Bimsha Supp. Reply Exhibit 10 General Accounting Office Report No. 74-178, *Clarifying Webb-Pomerene Act Needed to Help Increase U.S. Exports* (Aug. 22, 1973).

RULING:

I take official notice of this federal government report and admit it into evidence. 46 C.F.R. § 502.226.

Chief Cargo submitted two exhibits with its reply to Bimsha's original brief.

Chief Cargo Exhibit 1 Excerpts from transcript of deposition of Bimsha, June 2, 2011.

RULING:

Chief Cargo Exhibit 1 is admitted.

Chief Cargo Exhibit 2 MOU – Payment Commitment For Bimsha dated November 13, 2009.

RULING:

Chief Cargo Exhibit 2 is identical to Bimsha Supp. Exhibit 7 submitted with Bimsha's supplemental brief. As both parties seek admission of the exhibit, Chief Cargo Exhibit 2 is admitted.

IV. FINDINGS OF FACT.[7]

The facts of this case are fairly straightforward. Bimsha is in the business of manufacturing garments in Pakistan. I take official notice that Chief Cargo is licensed by the Commission as an NVOCC, with FMC Lic. No. 014365. *See* FMC OTI list, http://www2.fmc.gov/oti/OTIList_NVO_TradeNames.aspx, last visited Dec. 9, 2011. Since at least September 23, 2008, Bimsha has used Chief Cargo as an NVOCC when shipping goods from Pakistan to the United States. Bimsha is a shipper within the meaning of the Shipping Act on all three shipments. (Bimsha Supp. Exhibits 3.A, 4.A, and 5.A.) *See* 46 U.S.C. § 40102(22) ("The term 'shipper' means – (A) a cargo owner; [or] (B) the person for whose account the ocean transportation of cargo is provided. . . .").

Kaiser, which has not responded to the Complaint and has not mounted a defense, is identified on the relevant bills of lading as a party also to be notified when the cargo arrived at its port of discharge. Kaiser is located at the same address as Chief Cargo: 175-41 148th Road, Jamaica, New York, New York 11434. (Bimsha Supp. Exhibits 3.A, 4.A, and 5.A.) I take official

---

[7] To the extent any finding of fact may be deemed a conclusion of law, it should be considered a conclusion of law. Similarly, to the extent any conclusion of law may be deemed a finding of fact, it should be considered a finding of fact. Any fact proposed by a party the substance of which is not discussed in this decision is considered irrelevant or not supported by the evidence cited.

notice of the absence of any Commission record indicating that Kaiser Apparel, Inc., is licensed by the Commission as an NVOCC, *see* http://www2.fmc.gov/oti/OTIList_NVO_TradeNames.aspx, last visited Dec. 9, 2011, an ocean freight forwarder, *see* http://www2.fmc.gov/oti/OTIList_FF_TradeNames.aspx, last visited Dec. 9, 2011, or registered as a vessel-operating common carrier, *see* https://www2.fmc.gov/FMC1Users/scripts/ExtReports.asp?tariffClass=vocc, last visited Dec. 9, 2011. Bimsha does not allege that Kaiser operated as a vessel-operating common carrier or marine terminal operator.

In May 2009, Bimsha shipped the first of the three shipments at issue. On May 8, 2009, Chief Cargo issued Chief Cargo bill of lading number CC-586-003-NYK for container number UACU-821388-5. The bill of lading identifies Bimsha as the shipper; Soneri Bank Ltd. as the consignee; Rich Kids Jean Corp. (Rich Kids Jeans) as the notify party; Karachi, Pakistan, as the place of receipt and port of loading; New York USA as the port of discharge and final destination; Kaiser as an "Also Notify Party;" and indicates the goods were shipped on board on 08 May 2009. M.R. Traders (Pvt) Ltd., signed the bill as agent for Chief Cargo. (Bimsha Supp. Exhibit 3.A.)

Counsel for Bimsha questioned the representative of Chief Cargo about release of container number UACU-821388-5.

> [Bimsha counsel]. In the case of the first shipment in the claim, do you know whether the goods were released?
>
> A. Yes, it was released.
>
> [Bimsha counsel]. Who released the goods?
>
> A. Chief Cargo released the goods.
>
> [Bimsha counsel]. Did Chief Cargo release the goods without payment or with payment?
>
> A. Without original bill of lading.
>
> [Bimsha counsel]. They released without?
>
> A. Yes.

(Bimsha Supp. Exhibit 8 (Transcript of Chief Cargo deposition June 3, 2011, at 14).) Therefore, Bimsha has established that after container number UACU-821388-5 arrived in New York, Chief Cargo released it to Rich Kids Jeans without requiring presentation of an original bill of lading.

In June 2009, Bimsha shipped the second of the three shipments at issue. On June 17, 2009, Chief Cargo issued Chief Cargo bill of lading number CC-592-003-NYK for container number

GATU-840819-5. The bill of lading identifies Bimsha as the shipper; Soneri Bank Ltd. as the consignee; Rich Kids Jeans as the notify party; Karachi, Pakistan, as the place of receipt and port of loading; New York, USA as the port of discharge and final destination; Kaiser as an "Also Notify Party;" and indicates the goods were shipped on board on 17 June 2009. M.R. Traders (Pvt) Ltd., signed the bill as agent for Chief Cargo. (Bimsha Supp. Exhibit 4.A.) During the argument on September 28, 2011, counsel for Chief Cargo conceded that Chief Cargo released all three shipments at issue without requiring presentation of an original bill of lading. *See* Sept. 28, 2011, Transcript at 77 ("JUDGE GUTHRIDGE: [T]here's no dispute about the fact, if I understand you correctly, Mr. Perrone, that Chief Cargo did release those three containers without presentation of the bills of lading. Is that correct? [Chief Cargo Counsel]: That's correct."). *See also id.* at 24-26, 28. As Chief Cargo concedes, after container number GATU-840819-5 arrived in New York, Chief Cargo released it to Rich Kids Jeans without requiring presentation of an original bill of lading.

In August 2009, Bimsha shipped the third of the three shipments at issue. On August 21, 2009, Chief Cargo issued Chief Cargo bill of lading number CC-598-001-NYK for container number UACU-525311-7. The bill of lading identifies Bimsha as the shipper; Soneri Bank Ltd. as the consignee; Rich Kids Jeans as the notify party; Karachi, Pakistan, as the place of receipt and port of loading; New York USA as the port of discharge and final destination; Kaiser as an "Also Notify Party;" and indicates the goods were shipped on board on 21 August 2009. M.R. Traders (Pvt) Ltd., signed the bill as agent for Chief Cargo. (Bimsha Supp. Exhibit 5.A.) As Chief Cargo concedes, after container number UACU-525311-7 arrived in New York, Chief Cargo released it to Rich Kids Jeans without requiring presentation of an original bill of lading.

On November 13, 2009, Bimsha and Rich Kids Jeans signed an MOU entitled "Payment Commitment For Bimsha." The MOU states: "Rich Kids is committed to make payments to [Bimsha] for the outstanding payments," (Bimsha Supp. Exhibit 7), followed by a list of dates and payment amounts. It concludes, "[w]e will make every [effort] to [fulfill] this plan." (*Id.*)

V. BIMSHA HAS NOT ESTABLISHED THAT KAISER APPAREL, INC., IS A NON-VESSEL-OPERATING COMMON CARRIER OR THE ALTER EGO OF CHIEF CARGO.

A. Background.

On August 2, 2010, the Secretary served the Complaint and the Notice of Filing of Complaint and Assignment on Respondents. *Bimsha Int'l v. Chief Cargo Services, Inc.*, FMC No. 10-08 (FMC Aug. 2, 2010) (Notice of Filing of Complaint and Assignment). Each Respondent also received a letter from the Secretary advising Respondents that pursuant to Commission Rules, Respondents were required to answer the Complaint within twenty days. *See* Letters dated August 2, 2010, from Karen V. Gregory to Respondents. *See also* 46 C.F.R. § 502.64(a) ("Respondent shall file with the Commission an answer to the complaint and shall serve it on complainant as provided in Subpart H of this part within twenty (20) days after the date of service of the complaint by the Commission."). I take official notice, 46 C.F.R. § 502.226, of information in the "correspondence" section of the Commission's docket indicating that on August 4, 2010, Federal Express delivered

the Complaint, Notice, and letter to Kaiser. Kaiser has not answered or otherwise responded to the Complaint, and has not participated in this proceeding.

Bimsha alleges that "Respondents" (Chief Cargo and Kaiser) are "doing business . . . performing freight forwarding and cargo handling services paying freight charges, paying import duties and performing US Customs clearance services for its customers." (Complaint ¶ V.) In its opening brief, Bimsha states that:

> The claimant has filed this claim against the two Respondents, Chief Cargo, Inc, and OTI and/or NVOCC [*sic*] (License Number 14365N).
>
> Prior to the making of this shipping contract the Respondents represented themselves as the freight forwarder party and the notify party. Upon information and belief, both Respondents are inter related [*sic*] and maintain their offices at the same location at 175-41 148th Road, Jamaica NY 11434.

(Bimsha Brief dated June 29, 2011, at 3.)[8] Bimsha later states:

> This complaint is filed against the two Respondents:
>
> 1. Chief Cargo Services, Inc, an OTI and/or NVOCC. At the time of making of the shipping contract Chief Cargo Services, Inc, represented itself as a freight forwarder with license held with the FMC and
>
> 2. Kaiser Apparel, Inc as the Second Notify party both with similar addresses.

(*Id.* at 6-7.) In its reply brief dated August 15, 2011, Bimsha states: "The Court is respectfully advised that although served with legal process by the Complainant, the added Respondent, Kaiser Apparel, Inc., has defaulted and has failed to serve any opposition or to defend the claim." (Bimsha Reply Brief dated Aug. 15, 2011, at 7.) Bimsha did not cite to any evidence in either brief upon which a finding that Kaiser operated as a common carrier, ocean transportation intermediary, or marine terminal operator.

> The subject of Kaiser's liability was discussed in the September 28 argument.
>
> JUDGE GUTHRIDGE: Who is Green Text Apparel?
>
> [Bimsha Counsel]: That's the inspecting company hired by the, the defendant to inspect the goods for them in Pakistan.

---

[8] Bimsha did not number the pages of its brief. This statement is on the third page counting the cover sheet as page 1.

[Chief Cargo Counsel]: Chief Cargo – Your Honor, Chief Cargo never hired anybody to inspect the goods. I think when he says defendant, he's talking about Kaiser Apparel, the receiver of the cargo.

JUDGE GUTHRIDGE: Is that correct?

[Bimsha Counsel]: That is correct. Kaiser Apparel is the alter ego for Chief Cargo.

[Chief Cargo Counsel]: It is not.

[Bimsha Counsel]: They live in the same building, the same address. They have overlapping directors and they are –

JUDGE GUTHRIDGE: Do you have any evidence – is there any evidence of that in the record, Mr. Schwartz?

[Bimsha Counsel]: Yes.

JUDGE GUTHRIDGE: Where?

[Bimsha Counsel]: We alleged it in our claim that Chief Cargo was the second notified party because the first notified party was Chief Cargo, and they are used as a second notified party. It's cited in the bill of lading, which was drafted by Chief Cargo.

JUDGE GUTHRIDGE: But, how does, how does that establish any interlocking nature between –

[Bimsha Counsel]: Same address, same telephone number, same parties.

JUDGE GUTHRIDGE: That doesn't mean that they're the same entity.

[Bimsha Counsel]: It means that they have a second party involved in the transaction. So, if there is a failure on the first party, the second party will pick up and follow through. We believe that's not the issue here.

Sept. 28, 2011, Transcript at 45-47.

In the Order of October 3, 2011, issued after the September 28, 2011, argument, I stated:

I note that respondent Kaiser . . . has not appeared in this proceeding. Bimsha alleges that Respondents violated section 10(d)(1) of the Shipping Act. Kaiser is identified on the bills of lading as the "second notify party."

> The Commission has held that "by definition, only a common carrier, ocean transportation intermediary or marine terminal operator may violate section 10(d)(1)." *Houben v. World Moving Services, Inc.*, FMC No. 1887(I), Order at 7 n.8 (FMC July 6, 2010) (Order Vacating the Decision of the Settlement Officer and Finding a Violation of the Shipping Act by Respondent Cross Country Van Lines, LLC). Bimsha['s] original brief and appendix do not present any evidence supporting a finding that Kaiser is a common carrier, ocean transportation intermediary, or marine terminal operator. I take official notice of the absence of any Commission record indicating that Kaiser Apparel, Inc., is licensed by the Commission as an NVOCC. *See* http://www2.fmc.gov/oti/OTIList_NVO_TradeNames.aspx, last visited Sept. 21, 2011, or registered with the Commission as a vessel-operating common carrier. *See* https://www2.fmc.gov/FMC1Users/scripts/ExtReports.asp?tariffClass=vocc, last visited Sept. 21, 2011. In its brief, Bimsha should address specifically what, if any, relief the Commission may award against Kaiser on a complaint alleging a violation of section 10(d)(1).

Bimsha Int'l v. Chief Cargo Services, Inc., FMC No. 10-08 (ALJ Oct. 3, 2011) (Order for Parties to File Supplemental Proposed Findings of Fact, Appendices, and Briefs).

In its supplemental brief dated October 14, 2011, Bimsha states:

> Respondent Kaiser Apparel, Inc, was designated as the "Notify Party" with the same address as Chief Cargo, same telephone number of Chief Cargo, to be notified of any discrepancy in the shipping documents, regarding importing and customs issues, for transportation of the goods, and for delivery issues arising out the shipping of the goods. Respondent Kaiser Apparel was listed as the "Also Notify Party" Notify Party on the Bills of Lading, the Commercial Invoices, the Packing Lists prepared for the shipments of goods for the parties involved.
>
> On September 23, 2008, Respondent, Chief Cargo wrote to its agent MR Group in Pakistan a letter guaranteeing that all shipments for the account of Chief Cargo and Kaiser Apparel will not be released without proper endorsed Bills of Lading concerning Claimants goods ([Bimsha Supp. Exhibit 2] annexed).

(Bimsha Supp. Brief at 5.)

In its supplemental reply brief, Bimsha states:

> Kaiser Apparel has failed to defend this action. Kaiser was served with FMC Complaint and failed to respond. Kaiser was listed on the Bills of Lading as "Also Notify Party", on the commercial invoices as "Notify Party" on the packing list and was indicated as handler of all shipments between MR Group (Chief Cargo agent in Pakistan) and Chief Cargo in the USA. Kaiser Apparel was Chief Cargo's alter ego

and a claim was duly filed by Bimsha against Kaiser. A default judgment against Kaiser Apparel is appropriate and requested by Bimsha.

(Bimsha Supp. Reply Brief dated November 3, 2011, at 4-5.)[9]

Bimsha Supp. Exhibit 2 cited in its supplemental brief is the letter dated 23 September 2008 on Chief Cargo stationery signed by Edmond Yau, President, to M.R. Group, Attn Athar Baig, Re Kaiser Apparel, stating: "Under professional procedure please be advised the Chief cargo [*sic*] Services, hereby guarantee that we will not release any shipment without proper endorsed Bill of lading. This is for all shipment under the account of Kaiser Apparel handle between M.R. Group and Chief Cargo Services Inc." (Bimsha Supp. Exhibit 2.)

I also note that the following colloquy took place in the deposition of Chief Cargo:

[Chief Cargo Counsel]. Mr. Lam, is Chief Cargo Services, Inc. in any way related to Kaiser Apparel?

A. No relation besides –

[Chief Cargo Counsel]. Are they a separate entity?

A. Separate.

[Bimsha Counsel]. They share the same office and the same location?

A. Yes, only the same office location.

[Bimsha Counsel]. The same physical address?

A. Yes.

[Bimsha Counsel]. Different owners?

A. Different owners.

* * *

[Bimsha Counsel]. Who is the owner of Kaiser Apparel?

A. Lena Chow.

---

[9] Bimsha did not number the pages of its supplemental reply brief. This statement is on the fourth and fifth page counting the cover sheet as page 1.

(Bimsha Supp. Exhibit 8 (Transcript of Chief Cargo deposition June 3, 2011, at 38-39).)

B. Conclusion Regarding Kaiser.

The Commission's Rules provide: "In the event that respondent should fail to file and serve the answer within the time provided, the presiding officer may enter such rule or order as may be just, or may in any case require such proof as he or she may deem proper . . . ." 46 C.F.R. § 502.64(b). *Compare* Fed. R. Civ. P. 55(b)(2) (When a party is in default, "[t]he court may conduct hearings or make referrals – preserving any federal statutory right to a jury trial – when, to enter or effectuate judgment, it needs to: . . . (C) establish the truth of any allegation by evidence; or (D) investigate any other matter.").

> After an entry of default, a court may examine a plaintiff's complaint to determine whether it alleges a cause of action. In making that determination it must assume that all well pleaded factual allegations are true. *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981); *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978); *Kelley v. Carr*, 567 F. Supp. 831, 840 (W.D. Mich. 1983); *see also* 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2688 at 447-48 (1983).
>
> Under Federal Rule of Civil Procedure 55(b)(2) a court, in its own discretion, may hold a hearing to "establish the truth of any averment" in the complaint. In this circuit, we have stated that this is appropriate only if the court has made "its requirements known in advance to the plaintiff, so that [he] could understand the direction of the proceeding and marshal[] such evidence as might be available [him]." *McGinty v. Berenger Volkswagen, Inc.*, 633 F.2d 226, 229 (1st Cir. 1980).

Quirindongo Pacheco v. Rolon Morales, 953 F.2d 15, 16 (1st Cir. 1992). The September 28, 2011, argument and the October 3, 2011, Order gave notice to Bimsha that despite the fact that Kaiser had not responded to the Complaint, Bimsha would need to prove that Kaiser was a common carrier, ocean transportation intermediary, or marine terminal operator to support entry of default against it for violating section 10(d)(1).

Merging the various allegations in Bimsha's arguments, Bimsha contends that Kaiser is liable for violating section 10(d)(1) either because Kaiser itself is an NVOCC that transported the cargo or that Kaiser is Chief Cargo's alter ego and liable for that reason. Bimsha relies on the following contentions to support this conclusion:

- Kaiser is identified as the "second notify party" on the bills of lading;

- Chief Cargo and Kaiser are located at the same address and have the same telephone number;[10]

- On September 23, 2008, Chief Cargo letter wrote to MR Group (Bimsha Supp. Exhibit 2) stating that Chief Cargo "will not release any shipment without proper endorsed Bill of lading. This is for all shipment under the account of Kaiser Apparel handle between M.R. Group and Chief Cargo Services Inc."

Balanced against this are the following facts:

- No Commission record indicates that Kaiser Apparel, Inc., is licensed by the Commission as an NVOCC;

- The Chief Cargo representative testified in deposition that Chief Cargo and Kaiser are not related;

- The Chief Cargo representative testified in deposition that Lena Chow is the owner of Kaiser.

The fact that an entity is identified as a "second notify party" on a bill of lading does not establish that the entity operated as an NVOCC on the shipment. Presumably, this means that if Chief Cargo, the carrier on the bill of lading, was not able to notify Rich Kids Jeans, the notify party identified on its bill of lading, Chief Cargo would notify Kaiser. Bimsha does not cite to any evidence that would support a finding that Kaiser assumed responsibility for the transportation of the shipments at issue or otherwise operated as an NVOCC by being identified as the "second notify party" on the bills of lading.

With regard to Bimsha's claim that Kaiser is the alter ego of Chief Cargo, the fact that Chief Cargo and Kaiser have the same street address and the same telephone number (assuming they have the same telephone number) does not prove that Kaiser is the alter ego of Chief Cargo, particularly in light of the deposition testimony that they are not related.

Bimsha's characterizations of Bimsha Supp. Exhibit 2 in its Supplemental Brief and Supplemental Reply brief are not accurate. Bimsha Supp. Exhibit 2 states that Chief Cargo "will not release any shipment without proper endorsed Bill of lading. This is for all shipment under the account of Kaiser Apparel handle between M.R. Group and Chief Cargo Services Inc." Although it is not written in the plainest of English, Chief Cargo states to M.R. Group, Chief Cargo's agent

---

[10] Bimsha contends that Kaiser "was designated as the 'Notify Party' with the same address as Chief Cargo, same telephone number of Chief Cargo." (Bimsha Supp. Brief at 5.) The bills of lading (Bimsha Supp. Exhibits 3.A, 3.B, and 3.C) establish that Chief Cargo and Kaiser have the same street address. Bimsha does not cite to evidence establishing that Chief Cargo and Kaiser have the same telephone number.

in Pakistan, that when Chief Cargo carries a shipment on Kaiser's account, Chief Cargo will not release the shipment without presentation of a properly endorsed bill of lading. The letter does not support a finding that the shipments are carried on a joint "account of Chief Cargo and Kaiser Apparel" (Bimsha Supp. Brief at 5) or that Kaiser is a "handler of all shipments between MR Group . . . and Chief Cargo." (Bimsha Supp. Reply Brief dated November 3, 2011, at 4-5.)

Bimsha has not established by a preponderance of the evidence that Kaiser is a common carrier, ocean transportation intermediary, or marine terminal operator, that Kaiser is the alter ego of Chief Cargo, or that Kaiser transported the shipments from Pakistan to the United States. Therefore, the complaint against Kaiser Apparel, Inc., must be dismissed with prejudice.

VI. CLAIMS AGAINST CHIEF CARGO.

A. Bimsha Has Established That Chief Cargo Operated as a Non-Vessel-Operating Common Carrier for the Transportation of the Three Containers.

Commission records demonstrate that Chief Cargo is licensed by the Commission as an NVOCC. As determined in Part III.B, *supra*, Bimsha established by a preponderance of the evidence that Chief Cargo issued Chief Cargo bill of lading number CC-586-003-NYK for container number UACU-821388-5, Chief Cargo bill of lading number CC-592-003-NYK for container number GATU-840819-5, and Chief Cargo bill of lading number CC-598-001-NYK for container number UACU-525311-7. Each bill of lading identifies Chief Cargo as an "NVOCC Operator, 'OTI' License No. 14365N." All three containers were transported by water from Pakistan to the United States. I find that Chief Cargo (an entity that as an NVOCC licensed by the Commission holds itself out as a common carrier) assumed responsibility for the transportation by water from Pakistan to the United States of containers number UACU-821388-5, GATU-840819-5, and UACU-525311-7. Therefore, Chief Cargo is subject to liability for a violation of section 10(d)(1) of the Act on any shipment at issue.

B. Bimsha Has Established That Chief Cargo Violated Section 10(d)(1) of the Shipping Act.

1. Chief Cargo released all three shipments without requiring presentation of an original bill of lading.

As determined in Part III.B, *supra*, Chief Cargo conceded that it released container number UACU-821388-5, container number GATU-840819-5, and container number UACU-525311-7 to Rich Kids Jeans, the "notify party," without requiring presentation of an original bill of lading.

2. Chief Cargo violated section 10(d)(1) when it released each shipment without requiring presentation of an original bill of lading.

a. Application of Commission precedent.

The Commission recently addressed section 10(d)(1) in *Houben v. World Moving Services, Inc.*, *supra*. In *Houben*, the Complainant/shipper made an agreement with World Moving Services, Inc. (WMS), an unlicensed entity, to ship cargo to Belgium and had made a partial payment to WMS. Complainant then paid the remaining balance as well as overweight charges directly to Cross Country Van Lines, LLC (CCVL), a licensed and bonded NVOCC. CCVL, acting as the NVOCC, consolidated two shipments with Complainant's shipment into a single cargo container and contracted with IM France as its destination agent. Thereafter, CCVL failed to pay IM France for its services on the three combined shipments. In the absence of payment from CCVL, IM France elected to retain the cargo notwithstanding Complainant's payments to WMS and CCVL. When CCVL failed to resolve its commercial dispute with IM France, Complainant sent the total charges required to secure release of his cargo to IM France to prevent its imminent seizure by customs authorities. CCVL's failure to resolve its dispute resulted in substantial delay and financial harm to Complainant.

> The Commission has found failing to fulfill NVOCC obligations, as here, failing to pay the destination agent monies which have been received by the NVOCC for such services, an unjust and unreasonable practice in violation of Section 10(d)(1). *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11 (I.D. 1991); *Symington v. Euro Car Transport, Inc.*, 26 S.R.R. 871, 873 (I.D. 1993); *European Trade[] Specialists v. Prudential Grace Lines*, 19 S.R.R. 59, 62-63 (FMC 1979); *Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788, 795 (I.D. 1992); and *Maritime [Service] Corporation v. Acme Fast Freight of Puerto Rico*, 17 S.R.R. 1655 (I.D. 1978), *aff.* 18 S.R.R. 853 (FMC 1978). In this case, record evidence clearly indicates that CCVL did not dispute that it owed the monies for the three subject shipments and that CCVL did not pay to IM monies which it had collected previously from the Complainant. As a direct consequence of CCVL's failure to fulfill this obligation, a nearly six month delay in completing the shipments ensued. The record contains evidence sufficient to satisfy the burden of proof standard for administrative proceedings. Accordingly, we find that CCVL violated Section 10(d)(1) by failing to engage in just and reasonable practices relating to receiving, handling, storing, or delivering property by failing to timely make payments necessary to secure release of the cargo in circumstances when it had already been paid by the shipper and by its failure to resolve a commercial dispute, practices which resulted in both delay and financial harm to the shipper.

Houben, 31 S.R.R. at 1405.

The test established by the Commission states that an NVOCC violates section 10(d)(1) when it fails to fulfill NVOCC obligations. The question for this proceeding becomes: When Chief

Cargo released cargo to Rich Kids Jeans, the "notify party," without requiring presentation of an original bill of lading, did it fail to fulfill an NVOCC obligation and engage in an unjust and unreasonable practice in violation of section 10(d)(1)?

It is instructive to examine the NVOCC obligations that the NVOCCs failed to perform in the cases cited by the Commission. In *Adair v. Penn-Nordic Lines*, 26 S.R.R. 11 (ALJ 1991, notice of finality Oct. 24, 1991), the complainant, through freight forwarder Corporate World International, engaged Penn-Nordic Line, an NVOCC, to transport a motorcycle to New Zealand. Corporate World had engaged Penn-Nordic to transport shipments for other shippers in the past and had failed to pay Penn-Nordic for some of those shipments.

On the shipment at issue:

> Corporate World booked the motorcycle shipment with Penn-Nordic, filled in the Penn-Nordic bill of lading forms, and arranged to have the shipment moved to California, intending to have it loaded onto the [ship] . . . . Penn-Nordic validated the bill of lading and made it an on-board bill, i.e., it announced in the document that the cargo was not only received by Penn-Nordic's agent in California but loaded on board a vessel, indicating loading as of January 14, 1990, with an on-board stamp validated as of that date. Nevertheless, as Penn-Nordic admits, Penn-Nordic removed the cargo from the container at the "last minute." Penn-Nordic did this, it states, because of difficulties Penn-Nordic had been having with Corporate World in regard to late payments and to Corporate World's "insisting that cargo be released before they pay."

Adair v. Penn-Nordic Lines, 26 S.R.R. at 19. Penn-Nordic stored the motorcycle in a warehouse where it accrued storage charges.

Penn-Nordic contended that it removed the motorcycle from the shipment when it realized that it had been misdescribed and mismeasured. The judge found:

> The record suggest[ed] not that Penn-Nordic aborted the shipment because it had visual reason to question the contents or measurement of the crate, but rather that Penn-Nordic did this to pressure Corporate World to pay its delinquent accounts as well as the instant account. The claim that the crate contained a mismeasured and misdescribed cargo appears to be an after-the-fact rationalization. However, whatever the reason, once Penn-Nordic issued an on-board bill of lading, which is an independent document on which Corporate World and other persons customarily rely in shipping, the abrupt termination of the shipment contrary to such a bill subjects Penn-Nordic to liability.

* * *

There is therefore a basis to find that Penn-Nordic unreasonably aborted the motorcycle shipment notwithstanding the fact that it had issued an on-board bill of lading, thereby allowing a misleading shipping document to go forward in the shipping process. However, the negligent or deliberate issuance of an on-board bill of lading is not the only basis for a finding that Penn-Nordic acted unreasonably. Penn-Nordic made no efforts to protect the interests of the cargo owner or consignee. Penn-Nordic argues that it was dealing with the nominal shipper, Corporate World, which listed itself on the bill of lading as both exporter and forwarding agent. However, the bill of lading also clearly identified the consignee of the shipment . . . and even provided his address and telephone number in New Zealand. As Corporate World notes, Penn-Nordic need not have aborted the shipment. It could have shipped the motorcycle to New Zealand, and if payment had still not been received in the United States, could have retained possession of the cargo until paid in New Zealand by the consignee or by Corporate World. Instead, Penn-Nordic aborted the shipment, ignored the interests of the cargo owner and the consignee, and did not make any effort to notify the consignee that the motorcycle had been placed in a warehouse where it was accruing storage charges. Indeed, even by May 11, 1990, some three months after the shipment was supposed to have arrived in New Zealand and almost one month after Penn-Nordic had been paid for the shipment, Penn-Nordic had still not advised the consignee . . . as to what had happened to his motorcycle.

Penn-Nordic's indifference to the interests of the cargo owner and consignee in New Zealand, as shown above, is consistent with its subsequent behavior when it was finally paid freight for the shipment in April 1990. According to Penn-Nordic's attorney, . . . Penn-Nordic had agreed to move the shipment and absorb ("waive") the storage costs once payment of freight had been received. However, Mr. Garcia of Penn-Nordic simply reneged on this agreement, stating that "our attorney made an error" and that the storage charges could not be waived. Thus, Penn-Nordic issued and allowed an on-board bill of lading to go forward, on which document other persons would rely, failed to notify the cargo interests that the bill of lading was incorrect, and after agreeing, through its attorney, that Penn-Nordic would move the shipment forward and pay storage charges that Penn-Nordic itself had caused to accrue, reneged on its agreement. Moreover, Penn-Nordic has received payment of freight for the shipment, but retains the freight and refuses to refund it, although it never performed the transportation service.

The above litany of misconduct by Penn-Nordic amply demonstrates that Penn-Nordic failed to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property," in violation of section 10(d)(1) of the 1984 Act.

Id. at 19-20 (citation to record omitted).

In *Symington v. Euro Car Transport*, 26 S.R.R. 871 (ALJ 1993), Notice not to Review (FMC Apr. 22, 1993), the complainant entered into an oral contract with Euro Car, an NVOCC, to ship a car. Complainant transmitted $16,600 to Euro Car, which was supposed to remit $15,750 to the seller of the car, purchase insurance, and retain the remainder for shipping costs. Euro Car took the money, but failed to carry out its obligations under the contract or to return the money despite repeated demands. Complainant never received his car and was out of pocket in the amount of $16,600. The administrative law judge held that by retaining complainant's money, but failing to carry out its obligation to pay for the automobile and arrange to carry it to its destination, Euro Car violated several sections of the Act, including section 10(d)(1) by failing to establish, observe and enforce just and reasonable regulations and practices relating to receiving, handling, storing, or delivering property. *Symington v. Euro Car Transport, Inc.*, 26 S.R.R. at 873.

The shipment at issue in *Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co.*, 26 S.R.R. 788 (ALJ 1992, admin. final Dec. 31, 1992) (*Tractors and Farm Equipment v. Cosmos*), occurred in 1979, *id.* at 792, when the Shipping Act, 1916, was the controlling statute. Section 17 of the Shipping Act, 1916, provided in part:

> Every [common carrier by water in foreign commerce] and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

46 U.S.C. § 816 (1976) (repealed). Section 17 of the 1916 Act was the forerunner of section 10(d)(1) of the 1984 Act. *See Puerto Rico Ports Authority v. Federal Maritime Comm'n*, 919 F.2d 799, 801 (1st Cir. 1990) ("Section 10(d)(1) of the 1984 Act tracks the language of § 17 of the 1916 Act"); *Crowley Liner Services, Inc. v. Puerto Rico Ports Authority*, FMC No. 00-02, 2001 WL 503699, at *2 (ALJ Apr. 26, 2001) (section 17, second paragraph, Shipping Act, 1916 (46 U.S.C. sec. 816, as it existed prior to 1984) is predecessor statute to section 10(d)(1)).

Tractors and Farm Equipment (TAFE), a buyer in India, placed orders to purchase 5635 tractor tires from an American manufacturer. To take advantage of a temporary reduction of import duties, the tires had to arrive in Madras, India, by September 30, 1979. Cosmos Shipping Co. (Cosmos), a licensed freight forwarder (26 S.R.R. at 789), prepared the shipping documents. On booking notes and dock receipts, Cosmos identified the tires as "passenger tires," which take up less space, instead of "tractor tires." The ship en route to Madras only had room for 3600 tractor tires. Nevertheless, Cosmos prepared a certificate of origin showing that 5635 tractor tires were "clean shipped on board" to be transported to Madras. Cosmos also prepared a bill of lading showing that the tires were "clean shipped on board," but the VOCC validated the bill of lading as "received for shipment." Cosmos then changed the bill of lading to indicate falsely that the tires were "clean shipped on board" to meet a requirement to enable Cosmos to obtain payment of freight and cost of the goods under a letter of credit. *Tractors and Farm Equipment v. Cosmos*, 26 S.R.R. at 792-795.

> The result of this pattern of misconduct by Cosmos (preparing incorrect or false booking notes, dock receipts, certificate of origin, bills of lading, rejection of [the VOCC's] offer to transfer tires to another carrier or another ship so as to meet the September 30 deadline, authorizing [the VOCC] to carry the rest of the shipment on later vessels) was that TAFE was induced to pay in full under the letter of credit, although its contract [with the tire manufacturer] was breached, i.e., the entire shipment had not arrived by September 30, 1979. This misconduct by Cosmos caused TAFE damage . . . .

Id. at 795.

> The record in this case provides an eloquent example of the damage that a freight forwarder can cause if it fails to observe just and reasonable practices and forgets that it acts as a fiduciary having the power to inflict harm on the shipping public. On the basis of the facts discussed above, I conclude that [Cosmos] . . . has violated section 17 . . . (currently section 10(d)(1), 1984 Act) by failing to establish, observe, and enforce just and reasonable practices relating to the receiving, handling, storing or delivering of property.

Id. at 796.

In *Maritime Service Corp. v. Acme Fast Freight*, complainant Maritime Service, the authorized agent for the billing and collecting of certain demurrage due to four vessel-operating common carriers (VOCCs), alleged that twenty-three NVOCCs violated several sections of the 1916 Act, including sections 17 (quoted above) and 18(a), by failing and refusing to pay demurrage due under the terms of the tariffs of the four VOCCs. *Maritime Service Corp. v. Acme Fast Freight of Puerto Rico*, 17 S.R.R. 1655, 1656 (ALJ 1978). Section 18(a) imposed requirements on common carriers by water in interstate commerce that were comparable to the requirements imposed on common carriers by water in foreign commerce by section 17 of the 1916 Act and section 10(d)(1) of the 1984 Act.

> Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

46 U.S.C. § 817(a) (1976) (repealed).

With regard to sections 17 and 18(a), the administrative law judge stated:

> It . . . is alleged that the respondents subjected property entrusted to them as NVOCCs to liens for unpaid demurrage without the knowledge or consent of the owners of the property, an unreasonable practice related to the receiving, handling, storing and delivering of property in violation of Sections 17 and 18(a) of the Act.

Maritime Service Corp. v. Acme Fast Freight of Puerto Rico, 17 S.R.R. at 1656. The judge found that:

> Respondent NVOCCs hold themselves out to the public to provide transportation facilities between the United States and Puerto Rico. Respondents carry the property of the shipping public which utilizes their services. That carriage of property is subject to the tariffs of the vessel-operating common carriers engaged by the respondents. The bill of lading contracts, a part of the filed tariffs of the vessel-operating common carriers for which [Maritime Service] acts as agent, provide for liens against the cargo for ocean freight and other charges for the transportation.
>
> The respondents' failure to pay applicable demurrage charges subjected the property of the shipping public to vessel-operating common carriers' liens, and this practice resulted in the respondents' failure to establish, observe and enforce just and reasonable practices in connection with the receiving, handling or delivering of property, in violation of Section 17 and Section 18(a) of the Act.

Id. at 1662. The judge concluded that the NVOCCs are "subject to Sections 15, 16, 17, and 18 of the Shipping Act, 1916; and . . . are in violation of those sections." *Id.* at 1666. On review, the Commission affirmed the finding of the violation of section 18(a) without explanation. *Sea-Land Service, Inc. v. Acme Fast Freight of Puerto Rico*, 18 S.R.R. 853, 854 (FMC 1978), *aff'd sub nom Capitol Transp., Inc. v. United States*, 612 F.2d 1312 (1st Cir. 1979). With regard to section 17, the Commission stated "[w]e do not find any violation of Section 17 on the facts and circumstances presented here." *Id.*, 18 S.R.R. at 857 n.8.[11]

European Trade Specialists v. Prudential Grace Lines, decided under section 17 of the Shipping Act, 1916, is problematic. In *European Trade*, a United States exporter alleged that the respondent Hipage, a freight forwarder licensed by the Commission, violated section 17 when it failed to notify the exporter of problems with its shipment. In the initial decision, the administrative law judge found that the failure to notify did not constitute a violation of section 17.

---

[11] The Commission may have based this conclusion on the fact that the transportation at issue was interstate trade between the United States and Puerto Rico governed by section 18(a), not foreign trade governed by section 17. *See* 46 U.S.C. § 801 (1976) (repealed) (definitions of "common carrier by water in foreign commerce" and "common carrier by water in interstate commerce").

> A "practice" unless the term is in some way restricted by decision or statute, means "an often repeated and customary action." The record demonstrates that it is the "practice" of Hipage to notify shippers of problems arising over their shipments. Thus what we have here is not a question of the establishment of a just or unjust practice but an allegation of a single departure from a practice which I am sure complainants would characterize as just and reasonable. In other words complainants have not, in any meaningful way, alleged nor have they shown that Hipage established, observed or enforced the practice of not notifying shippers of problems involving their shipments. Indeed complainants offer as one of the grounds for the violation of Section 17 that Hipage treated them differently them it did other shippers.
>
> Since Section 17 speaks only to practices it follows that Hipage, even if this single failure had been established by complainants, would not have violated Section 17 because it had not established, observed or enforce an unjust or unreasonable practice.

European Trade Specialists v. Prudential Grace Lines, 17 S.R.R. 1351, 1365 (ALJ 1977) (citations and footnotes omitted). Upon review, the Commission affirmed the judge's finding that the failure to notify did not violate section 17.

> Even assuming, if not deciding, that [complainant] European was not notified of the classification and rating problem we cannot say that such conduct by Hipage amounts to a violation of Section 17. Unless its normal *practice* was not to so notify the shipper, such adverse treatment cannot be found to violate the section as a matter of law. We therefore, need not reach the issue of whether in this case the shipper was so notified.
>
> Similarly, because any violation of § 510.23 of the Commission's regulations must be considered in terms of Section 17 by operation of the language of the Order on Remand, without a showing of continuing violations of these regulations no Section 17 violation can be found.

European Trade Specialists v. Prudential Grace Lines, 19 S.R.R. 59, 63 (FMC 1979) (emphasis in original) (citation omitted). To the extent there is a conflict between *Houben* and *European Trade Specialists*, I follow *Houben*, the more recent case.

To summarize, in *Houben*, the Commission recognized that the following acts or failures to act are violations of section 10(d)(1): Failing to pay the destination agent monies which have been received by the NVOCC for such services (*Houben*); failing to notify the shipper that it had not transported the cargo, failing to transport the cargo after being paid, and failing to transport the cargo to coerce payment for other shipments (*Adair*); failing to carry out its obligations to transport the cargo under the contract or to return the money despite repeated demands (*Symington*); preparing incorrect or false shipping documents, rejecting an offer to transfer tires to another carrier,

authorizing the VOCC to carry the rest of the shipment on later vessels to induce to payment (*Tractors and Farm Equipment*); failing to pay applicable demurrage charges (*Maritime Service*). Chief Cargo's release of Bimsha's shipments without requiring presentation of an original bill of lading is comparable to these violations. I find that when Chief Cargo released the shipments to Rich Kids Jeans, the "notify party," without requiring presentation of an original bill of lading, it failed to fulfill NVOCC obligations and committed an unjust and unreasonable practice in violation of section 10(d)(1) of the Act. 46 U.S.C. § 41102(c).

b. Chief Cargo's arguments.

Chief Cargo contends that Bimsha "has developed not one shred of factual evidence (admissible or otherwise) as to what Chief Cargo's practices and procedure are for the handling of cargo, much less that those practices and procedures of Chief Cargo are unjust as they apply to Bimsha." (Chief Cargo Supp. Brief at 2.) I do not read section 10(d)(1), the Commission's decision in *Houben*, and the cases cited in *Houben* to require a complainant to establish that an NVOCC has a practice or procedure that discriminates against the complainant in order to establish a violation of section 10(d)(1). Section 10(d)(1) states that a "common carrier may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). An NVOCC violates section 10(d)(1) by failing to establish just and reasonable regulations and practices or by failing to observe and enforce those regulations. If Chief Cargo has not established the practice of requiring presentation of an original bill of lading before releasing cargo, it has failed to *establish* just and reasonable regulations and practices related to or connected with delivering property. If Chief Cargo has established the practice of requiring presentation of an original bill of lading before releasing cargo, on these three shipments, Chief Cargo failed to *observe and enforce* that practice. To the extent that a complainant must establish that a respondent has established a just and reasonable practice for delivering property before the respondent can be found not to have observed and enforced that practice, at least with regard to Bimsha (something I do not find the complainant is required to do), I find that the letter dated 23 September 2008 from Chief Cargo to M.R. Group (Bimsha Supp. Exhibit 2) establishes that practice.

Bimsha Supp. Exhibit 7/Chief Cargo Exhibit 2 is a document entitled MOU – Payment Commitment For Bimsha dated November 13, 2009. In this MOU, the president of Rich Kids Jeans promises to make a series of "payments to Bimsha for the outstanding payments." Chief Cargo argues that the MOU is a novation that extinguishes the obligations that Chief Cargo previously owed to Bimsha.

> The agreement stated that "Rich Kids is committed to make payments to Bimsha for the outstanding payments," and detailed a planned schedule of payment dates and amounts. This payment agreement was executed by, among others, Mr. Sheikh of Bimsha International and Yogesh Anand of Rich Kids Jeans Corporation.
>
> Execution of the agreement served as a novation that nullified the obligations created by the bills of lading that Chief Cargo Services, Inc. was allegedly in breach

> of as a result of the three containers being released to Rich Kids Jeans Corporation. A novation is the substitution of a new contract between either the same or different parties. The elements of a novation are "(1) a previously valid obligation; (2) an agreement of all parties to the new contract; (3) extinguishment of the old contract; and (4) a valid new contract supported by consideration." *See French Am. Banking Corp. v. Flota Mercante Grancolombiana, S.A.*, 609 F. Supp. 1352, 1357-58 (S.D.N.Y. 1985).

(Chief Cargo July 29, 2011, Reply Brief at 7-8 (citation to record omitted).)

Chief Cargo's novation argument was discussed during the September 28 argument.

> JUDGE GUTHRIDGE: Yes, and I do want to address your novation argument as part of this phone call. Novation arguably, and I think you used the word "estoppel" in there, it's a new, it's a new agreement and that should have stopped Bimsha from making any claim under the Shipping Act. Is that, is that your argument?
>
> [Chief Cargo Counsel]: It is.
>
> JUDGE GUTHRIDGE: Okay. "The Commission has held . . .," and this is the Commission, not an Administrative Law Judge, ". . . that the common law doctrines of waiver and estoppel may not be invoked to prohibit a party to an agreement subject to the Commission's jurisdiction. . .," and a bill of lading is arguably within the Commission's jurisdiction, ". . . from later challenging the agreement in a complaint filed with the Commission alleging that one of the parties to the agreement violated a duty imposed by the Shipping Act."
>
> That's in a [case] called, "Ceres Marine Terminal versus Maryland Port Administration." It's Commission Docket Number 94-01, and it's an order addressing issues on remand from the 4th Circuit, the 3rd August 15, 2001.
>
> And, can be found at 29, 29 [S]hipping [R]egulation [R]eports, page 356, and that quote is on page 372. So, that is – I'm not sure that novation, which seems to operate as an estoppel is a defense that can be raised with the Commission on that. I'm not making a ruling on that at this point, Mr. Perrone, but I'm giving you that –

Sept. 28, 2011, Transcript at 66-68.

> JUDGE GUTHRIDGE: [Estoppel] sounds sort of like the novation argument you're making, and so it would be – I'd appreciate you addressing that in the memo.
>
> [Chief Cargo Counsel]: Yes.

Id. at 82.

Chief Cargo did not address novation in its supplemental reply brief. Given the discussion at the September 28 argument, it may be that Chief Cargo intends to withdraw this argument. Chief Cargo does say that its supplemental brief should be considered in addition to its opening brief, however. (Chief Cargo Supp. Brief at 2.) Therefore, I address the novation argument.

In *Ceres v. Maryland Port*, the Commission held:

> Therefore, we hold that, as a matter of law, the common law doctrines of waiver and estoppel may not be invoked to prohibit a party to an agreement subject to the Commission's jurisdiction from later challenging the agreement in a complaint filed with the Commission alleging that one of the parties to the agreement violated a duty imposed on it by the Shipping Act. We further find that Ceres neither waived its rights under the Shipping Act by entering into an agreement under the Shipping Act, nor is estopped from challenging the terms of its agreement because it waited 18 months before filing its complaint with the Commission. To hold otherwise would abrogate the Commission's statutory duty to promote a transportation and marine terminal system free from undue and unreasonable discrimination.

Ceres Marine Terminal v. Md. Port Admin., 29 S.R.R. 356, 372 (FMC Aug. 15, 2001), complaint dismissed on other grounds, 30 S.R.R. 358 (FMC Aug. 16, 2004). I find that this principle equally supports a conclusion that a party cannot waive its rights against an NVOCC under the Shipping Act by entering into an agreement with the purchaser of the cargo for payment of the money owed by that purchaser to the shipper. Therefore, I conclude that the November 13, 2009, MOU pursuant to which Rich Kids Jeans agreed to pay Bimsha does not act as a novation of Bimsha's rights under the Shipping Act against Chief Cargo.

3. Bimsha has not established its damages.

Bimsha claims that it is entitled to a reparation award "in the sum of $207,809.74 with interest costs and legal expenses incurred of $79,331.00 as of June 28, 2011 amounting to the sum of $287,140.74." (Bimsha Supp. Brief at 9.) The Act provides: "If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a).

> (a) **Definition.** – In this section, the term "actual injury" includes the loss of interest at commercial rates compounded from the date of injury.
>
> (b) **Basic amount.** – If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305.

As the complainant, Bimsha has the burden of proving entitlement to reparations. *See James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (2003) ("As the Federal Maritime Board explained long ago: '(a) damages[12] must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.'").

> The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (Oct. 19, 1990)] and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.

Tractors v. Cosmos, 26 S.R.R. at 798-799 (footnote omitted).

The three shipments took place on May 8, 2009, June 17, 2009, and August 21, 2009. Bimsha filed its Complaint on July 28, 2010. Bimsha filed its Complaint within the three-year statute of limitations. Therefore, Bimsha may receive a reparation award for actual injury caused by a violation.

Bimsha claims that because Chief Cargo released the cargo to Rich Kids Jeans without requiring presentation of an original bill of lading, Bimsha was not paid $207,809.74 owed to it by Rich Kids Jeans. As found in Discussion Part III, *supra*, Bimsha failed to attempt to establish a foundation for the documents that it contends prove these damages. Without the documents, I find that Bimsha has not met its burden of proving damages by a preponderance of the evidence. Therefore, Bimsha's claim for a reparation award is denied.

4. Other relief.

a. Cease and desist order.

Bimsha seeks other relief. (Bimsha Supp. Brief at 9.) The Commission may issue a cease and desist order when a respondent has been found to have violated the Shipping Act. *Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Mississippi River*, 29 S.R.R. 718, 719-

---

[12] Reparations under the Shipping Act and damages are synonymous. *See Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

720 (ALJ Oct. 29, 2001); *Pittston Stevedoring Corp. v. New Haven Terminal, Inc.*, 13 F.M.C. 33, 44 (FMC Aug. 8, 1969) (Commission Report incorporating Presiding Examiner Report).

> A cease and desist order is generally issued when there is a reasonable likelihood or expectation that the respondent will continue or resume illegal activities. *Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342-1343 (I.D.), administratively final, December 4, 1997. A cease and desist order must be tailored to the needs and facts of the particular case. *Marcella Shipping Co. Ltd.*, 23 S.R.R. 857, 871-72 (I.D.), administratively final, March 26, 1986.

Hudson Shipping (Hong Kong) Ltd. d/b/a Hudson Express Lines – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984, FMC No. 02-06, 29 S.R.R. 1381, 1386 (ALJ July 10, 2003), administratively final (FMC Feb. 6, 2004) (Notice not to Review).

It has been determined that Chief Cargo violated section 10(d)(1) of the Act by releasing cargo to Rich Kids Jeans without requiring presentation of an original bill of lading. This occurred on three separate occasions over a period of three months. The person described as the "boss" of Chief Cargo was involved in the decisions to release the cargo. (Bimsha Supp. Exhibit 8 (Transcript of Chief Cargo deposition June 3, 2011, at 22-28).)

Although there is no indication that Bimsha continues to use Chief Cargo as an NVOCC for its shipments to the United States, Chief Cargo continues to operate as an NVOCC. Three shipments over three months on which Chief Cargo released the cargo without presentation of a bill of lading coupled with the involvement of Chief Cargo's "boss" in the decision to release the cargo suggests that there is a reasonable likelihood or expectation that Chief Cargo will continue or resume this illegal activity. Members of the shipping public must be protected from practices such as Chief Cargo engaged in here. Therefore, I find it appropriate to enter an order requiring Chief Cargo to cease and desist its practice of releasing cargo without requiring presentation of an original bill of lading.

b. Attorney's fees and costs.

Bimsha seeks an award of attorney's fees. (Bimsha Supp. Brief at 9.) The Shipping Act permits the Commission to award attorney's fees only in conjunction with a reparation award. 46 U.S.C. § 41305(b). Bimsha does not receive a reparation award; therefore, it is not entitled to attorney's fees. I also note that even if it were entitled to attorney's fees, Commission Rule 254 provides that the award is not made until after a final agency decision. 46 C.F.R. § 502.254; *Tienshan v. Tianjin Hua Feng*, 31 S.R.R. at 1847. *See also Tienshan v. Tianjin Hua Feng*, 32 S.R.R. 52 (ALJ 2011) (awarding attorney's fees), notice not to review (FMC July 20, 2011).

Bimsha seeks an award of costs associated with litigating this proceeding, apparently including the cost of Bimsha's principal traveling to the United States from Pakistan. (Bimsha Supp. Brief at 9; see Bimsha Supp. Exhibit 6.B (not admitted).) "The Commission is authorized only to

award reasonable attorney's fees, a term that does not include 'costs.'" *Tienshan v. Tianjin Hua Feng*, 32 S.R.R. at 67. Therefore, Bimsha's request for costs is denied.

ORDER

Upon consideration of the record herein, the arguments of the parties, and for the reasons set forth above, it is hereby

ORDERED that the complaint against respondent Kaiser Apparel, Inc., be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that Chief Cargo Services, Inc., **CEASE AND DESIST** from the practice of releasing cargo without requiring presentation of an original bill of lading. It is

FURTHER ORDERED that Bimsha International's request for an award of costs and attorney's fees be **DENIED**.

Clay G. Guthridge
Administrative Law Judge